RE MUHAMAD ALI HAMID

HIGH COURT MALAYA, PULAU PINANG
ZALEHA ZAHARI J
[CRIMINAL REVISION NO: 43-2-99]
28 APRIL 1999

CRIMINAL PROCEDURE: *Bail - Drug dependants - Drug Dependants (Treatment and Rehabilitation) Act 1983, s. 6 - Whether magistrate has power to release drug dependant on bail pending inquiry under s. 6 - Whether magistrate must conduct inquiry forthwith upon certification of person as a drug dependant - Whether inquiry must be a judicial trial*

CRIMINAL PROCEDURE: *Revision - Revisionary power of High Court - Criminal Procedure Code, s. 323 - Order of bail by magistrate under s. 6 of Drug Dependants (Treatment and Rehabilitation) Act 1983 - Whether an order pronounced by a Magistrate's Court in a criminal case or matter - Whether High Court has jurisdiction to review magistrate's order of bail under s. 323 of Criminal Procedure Code or s. 35 of Courts of Judicature Act 1964*

ADMINISTRATIVE LAW: *Judicial review - Rules of court - Compliance with - Rules of the High Court 1980, O. 53 - Courts of Judicature Act 1964, s. 25(2) - Whether application for revision under s. 323 of Criminal Procedure Code may be converted into judicial review under s. 25(2) of Courts of Judicature Act 1964*

This was an application for revision under s. 323 of the Criminal Procedure Code ('the Code') in respect of a magistrate's order of bail. The applicant who had been taken into custody by the police under s. 3 of the Drug Dependants (Treatment and Rehabilitation) Act 1983 ('the Act') was produced before a magistrate who then ordered that he be detained for tests under s. 4(1)(b) of the Act. Pursuant to the tests, the applicant was certified to be a drug dependant and was produced before a magistrate who then released him on bail set at RM10,000 pending an inquiry under s. 6 of the Act. Thereafter, the applicant applied to the High Court for a revision under s. 323 of the Code, challenging the quantum of the bail. At the hearing, however, the applicant submitted that the magistrate had no jurisdiction to release him on bail pending an inquiry under s. 6 of the Act; that an inquiry under s. 6 must be made **forthwith** upon the production of a person certified to be a drug dependant; and that the power to grant bail was only found in s. 4(1)(b) and not under s. 6. Conversely, the respondent argued that the magistrate was still empowered to grant bail by virtue of para 8(1) of the Third Schedule to the Subordinate Courts Act 1948 read with s. 390 of the Code.

The court then directed further arguments on whether proceedings under s. 6 of the Act came within the meaning of "proceeding before any subordinate criminal court", and whether such proceedings were within the High Court's criminal revisionary powers under s. 323 of the Code. The applicant conceded that proceedings under s. 6 of the Act did not fall within the court's supervisory jurisdiction under s. 323 of the CPC, but entreated the court to invoke its powers under s. 25(2) of the Courts of Judicature Act 1964 ('the CJA') read with para 1 of the Schedule thereto and review the magistrate's order of bail.

Held:

[1] A magistrate's decision under s. 6 of the Act is not an order pronounced by a Magistrate's Court in a criminal case or matter. Thus, a decision granting bail to secure attendance at an inquiry pursuant to s. 6 of the Act is not an order pronounced by a Magistrate's Court in a criminal case or matter. It does not fall within the meaning of a "proceeding before any subordinate criminal court" under s. 323 of the Code. Consequently, the instant court was **not** empowered to exercise its criminal revisionary powers under s. 323 of the Code, nor its general supervisory and revisionary jurisdiction under s. 35 of the CJA.

[2] A magistrate has **no** power to grant bail under s. 6 of the Act. Giving the words in ss. 4 and 6 of the Act their ordinary and literal meaning, a magistrate only has power to grant bail in the circumstances prescribed in s. 4(1)(b). Once the test results are known and the person confirmed a drug dependant, the magistrate must, upon receipt of such certification and taking into consideration the rehabilitation officer's report and after giving the person an opportunity to make representations, make any order that he deems fit. The magistrate, however, is **not** obliged to conduct a trial.

[3] The decision of the magistrate releasing the applicant on bail set at RM10,000 was liable to be set aside by an order of *certiorari* or declaration. However, the exercise of the power under s. 25(2) of the CJA has to be "in accordance with any written law or rules of court relating to the same", *viz*, O. 53 of the Rules of the High Court 1980 ('the RHC'). It was, therefore, inappropriate for the instant court to convert this criminal application for revision into an application for judicial review without requiring the applicant to comply with O. 53 of the RHC.

[Application for revision dismissed.]

Case(s) referred to:
Ang Gin Lee v. PP [1991] 2 CLJ 857 ***(foll)***
Hoo Thian Siong v. PP [1988] 2 MLJ 401 ***(refd)***
Ketua Pengarah Kastam v. Ho Kwan Seng [1977] 2 MLJ 154 ***(refd)***
Lim Hai Sun v. Officer-in-Charge, Drug Rehabilitation Centre & Anor [1992] 3 CLJ 1602 ***(refd)***
Mohd Shahriman Mohd Khairil v. PP & Anor [1998] 2 CLJ 855 ***(not foll)***
PP v. Kelvin Soh Ted Poh [1990] 1 CLJ 54 ***(not foll)***
Re Hj Sazali Datuk Hj Noor Tahir [1992] 3 CLJ 1753 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 25(2), 35, 66, Schedule para 1
Criminal Procedure Code, ss. 323, 390
Drug Dependants (Treatment and Rehabilitation) Act 1983, ss. 3, 4(1)(b), 6
Federal Constitution, arts. 5(3), 149
Rules of the High Court 1980, O. 53
Subordinate Courts Act 1948, Third Schedule para 8(1)

For the applicant - CV Prabhakaran (Roy Prabhakaran with him); M/s Praba & Assoc
For the respondent - Yaacob Hj Sam SFC

Reported by Farah Naim

JUDGMENT

Zaleha Zahari J:

This is an application for criminal revision under s. 323 of the Criminal Procedure Code ("the Code") and is concerned with the validity and the legal propriety of an order of bail made by a magistrate. The issue for determination initially relates to the issue of quantum of bail; at the hearing, questions the jurisdiction of the magistrate to grant bail at all; and towards the end of the hearing, invites the court to instead exercise its power of judicial review under s. 25(2) Courts of Judicature Act 1964.

All references to sections in this judgment, shall, unless otherwise stated, be to the Drug Dependants (Treatment and Rehabilitation) Act 1983. The background facts are as follows.

On 4 March 1999 Muhammad bin Ali ("the applicant") was taken into the custody of the police for being a suspected drug dependant pursuant to the powers conferred upon them by s. 3 of the Act. The applicant was then, within twenty-four hours, produced before a magistrate on 5 March 1999, who then issued an order directing the applicant to be detained for a period of 14 days at Lockup Kampong Selamat for the purpose of undergoing tests pursuant to s. 4(1)(b) of the Act and further directed that the applicant be produced again on 18 March 1999.

On 17 March 1999 Dr. T. Nachammal, Medical Officer Seberang Jaya Hospital Seberang Jaya certified that, after having carried out the necessary tests upon the applicant, he found the applicant to be a drug dependant within the meaning of the Act of the drug 'morphine'. Thereafter, on 17 March 1999, the applicant was again produced before a magistrate. The minutes recorded by the magistrate on that date reads as follows:

Penama hadir
PPI Zulhazi
Pegawai Pemulihan Noorfaezah
Peguambela Rajiv Prabakaran

Mahkamah: Jamin 10,000.00

Peguambela: Jamin ditetapkan untuk kehadiran O.K.T. 20/4/99 (Inquiri)

Jamin lulus.

t.t.
18-3-99

There was nothing to indicate from the minutes recorded on 18 March 1999 of counsel acting for the applicant objecting to the amount of bail set as being high nor as to the jurisdiction of the court to grant bail at that stage of the proceedings. Be that as it may, about a week later, Tetuan Praba & Associates, by letter dated 25 March 1999, wrote to the judge of the High Court Pulau Pinang in the following terms:

Tuan Hakim
Mahkamah Tinggi
Pulau Pinang

Tuan,

Per: Mahkamah Majistret di Butterworth
Mohd. Ali Bin Hamid
Kes Tangkap No. 89-432-99
Drug Dependants (Treatment and Rehabilitation) Act 1983

Kami merujuk kepada perkara tersebut diatas yang mana ditetapkan untuk "enquiry" pada 20/4/99.

Kes ini telah ditetap untuk sebutan pada 18/3/99 dimana anak guaman kami telah didapati "positive" selepas ujian urine anak guaman kami dilaksanakan.

Jaminan telah diberikan sebanyak RM 10,000/- oleh Tuan Majistret walaupun kami telah membantah tentang jumlah tersebut diatas yang terlalu tinggi.

Kami akan berbesar hati jika pihak tuan dapat menyemak file ini sebelum 20/4/99 di bawah Seksyen 323 Kanun Acara Jenayah.

Sekian, terima kasih.

Yang benar,

t.t

The issue raised in this letter appeared to be a straightforward one, ie, as to quantum of bail set and the court issued a notice for this application for criminal revision to be heard on 8 April 1999.

When this application was however called for hearing on 8 April 1999, Encik Rajiv Prabhakaran, counsel for the applicant's arguments however were not centered on the issue of the amount of bail as set out in his letter dated 23 March 1999. He went into a more substantive issue ie, that of the jurisdiction of the magistrate to grant bail pending the holding of an inquiry as to whether an order under s. 6 of the Act should be made against the applicant in a situation where the results of the tests carried out under s. 4(1)(b) were already known.

I am made to understand that the reason for the change in issue for the determination of this court by Encik Rajiv is because, in a similar criminal application for revision made by him (ie, Penang High Court Criminal Revision No. 43-3-99) which came up for hearing before Y.A. Dato' Jeffrey Tan on 5 March 1999 the issue of the jurisdiction of the magistrate to grant bail pending inquiry under s. 6 was raised by the Honorable Judge himself, and in that application, the learned Judge had ruled that the magistrate had no jurisdiction to do so.

From the conduct of Encik Rajiv on 8 March 1999 he clearly expected this matter to be dealt with very summarily by this court. That he need do no more than to bring the Court's attention to the decision of Y.A. Dato' Jeffrey in that earlier application and for this court to then issue a similar order. That however was not to be.

At the outset of hearing of this application Encik Yaacob Sam, the senior federal counsel (who was invited by this court to assist it in the making of a considered decision in this application for criminal revision) informed the court that the decision of Y.A. Dato' Jeffrey imposing upon a magistrate the obligation to conduct an inquiry forthwith under s. 6 upon the production of a subject certified to be a drug dependant would have a serious impact on the work load of magistrates. He urged this court to give him an opportunity to submit fully on the issue raised. In the light of this development both parties were called to make their respective submissions on its merits.

Encik Rajiv commenced his submission by reading unamended ss. 4 and 6 of the Act ie, prior to its amendment by Act A 1018 which came into force on 1 September 1998. When the amendment was pointed out to him he continued his submissions by reference to the court's amended copy of the Act. His submission was but a bare submission, a mere reading of ss. 3, 4, and 6 which read as follows:

> 3. (1) An officer may take into custody any person whom he reasonably suspects to be a drug dependant.
>
> (2) A person taken into custody under subsection (1) may be detained for a period not exceeding twenty-four hours at any appropriate place for the purpose of undergoing tests.
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> 4. (1) If the tests cannot be held or completed or the results of such tests cannot be obtained within twenty-four hours from the time a person is taken into custody under subsection (1) of section 3:
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> (a) the person may be released on bail, with or without surety, by an officer to attend at the time and place mentioned in the bond; or
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> (b) the person may be produced by an officer before a magistrate, and the magistrate, shall, if the officer reports to the magistrate that it is necessary to detain him for the purpose of undergoing tests, order him to be so detained for such period not exceeding fourteen days to undergo tests or the magistrate may release him on bail, with or without surety, to attend at such time and place as may be mentioned in the bond for the purpose of undergoing such tests, or where such person has already undergone tests but the result of such tests has not yet been obtained, the magistrate may release him on bail, with or without surety, to appear at such place and time as may be mentioned in the bond to receive the result of the tests.
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> (2) The provisions of sections 390, 391, 392, 393 and 404 of the Criminal Procedure Code shall apply *mutatis mutandis* to a bail bond executed under this section in so far as they are not inconsistent with the provisions of this section, and references in the said sections to a police officer shall be construed as references to an officer under this Act.
>
> 5. ...
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> 6. (1) Where a person who has undergone the tests referred to in section 3 or 4 and, in consequence of such tests, is certified by a government medical officer or a registered medical practitioner to be a drug dependant, the officer shall produce him, or cause him to appear before a magistrate, and the magistrate shall upon the recommendation of a Rehabilitation Officer and after giving such person an opportunity to make representation:

(a) order such person to undergo treatment and rehabilitation at a Rehabilitation Centre specified in the order for a period of two years and thereafter to undergo supervision by an officer at the place specified in the order for a period of two years; or

(b) order such person to undergo supervision by an officer at the place specified in the order for a period of not less than two and not more than three years.

(2) An order of supervision imposed on a person under paragraph (a) and (b) of subsection (1) shall contain the following conditions:

(a) the person must reside in a State or Federal Territory or any area as specified in the order.

(b) the person must not leave the area where he resides without the written permission of the Director General;

(c) at the time specified in the order, the person shall report at the nearest police station or for a member of the armed forces at the place specified by an officer.

(d) the person shall not consume, use or possess any dangerous drugs;

(e) the person shall undergo such tests at such time and place as may be ordered by an officer, and

(f) the person shall undergo any programme for the rehabilitation of drug dependants held by the Government.

(3) Any person undergoing supervision under paragraph (a) or (b) of subsection (1) who fails to comply with any condition imposed under subsection (2) shall be guilty of an offence and shall on conviction be liable to be punished with imprisonment for a period not exceeding three years or to whipping not exceeding three strokes or to both.

My understanding of Encik Rajiv's bare submission are as follows: that a magistrate is only empowered to grant bail only if there was an express power conferred by the statute to do so. In this case, as the power to grant bail on a magistrate is only found in s. 4(1)(b), and not in s. 6, the court should construe that in the absence of such an express power, a magistrate was under a duty to conduct an inquiry forthwith upon production of a person certified to be a drug dependant. According to him that it was not open for a magistrate to adjourn the holding of an inquiry to another date, and pending the holding of such inquiry, to release that person on bail. The granting of bail according to him, was only envisaged in the circumstances prescribed by s. 4(1)(b) ie, for the purpose of undergoing tests. Only in that situation is a magistrate empowered to release him on bail to ensure that he appears at such place and

time as may be mentioned in the bond to receive the result of the tests; that a magistrate had no power whatsoever to grant bail in a situation where the results of such tests are already known. Encik Rajiv then referred to Y.A. Dato' Jeffrey's order in Criminal Revision No. 89-434-99 which reads as follows:

> Bahawa setelah menyemak perintah Magistret yang bertarikh 18.3.99 Mahkamah ini mendapati Majistret yang bijaksana tidak ada kuasa di bawah seksyen 4 atau 6 untuk perintahkan jaminan sehingga menunggu pemeriksaan (Inquiry) di mana keputusan ujian telahpun dikemukakan. Perintah terhadap jaminan diketepikan. Majistret yang bijaksana diperintahkan untuk menjalankan pemeriksaan (Inquiry) bawah seksyen 6 dengan segera untuk pelepasan subjek. Subjek itu di bawa ke hadapan Majistret bijaksana dengan serta merta.

The senior federal counsel replied that in determining whether a magistrate had jurisdiction to grant bail pending the holding of an inquiry as to the making of an order under s. 6 is not to be determined by an examination of the provisions of that Act only. He submitted that the absence of an express power in s. 6 for a magistrate to grant bail, could not and should not, be construed to mean that the magistrate is not empowered to do so. According to him the magistrate is still empowered to grant bail in such a situation by virtue of the power conferred under para. 8(1) of the Third Schedule to the Subordinate Courts Act 1948 read together with the power conferred by s. 390 Criminal Procedure Code which reads as follows:

(a) Paragraph 8 Third Schedule,
Subordinate Courts Act 1948

> 8.(1) Subject as hereinafter provided, power to issue process to secure the attendance of any person in court for any purpose, whether by warrant of arrest or summons, and to require any person to give security for his appearance or to meet any claim or demand, in such manner as may be prescribed by rules of court.

(b) **Section 390 Criminal Procedure Code**

> 390.(1) Before any person is released on bail, or released on his own bond, a bond for such sum of money as the police officer or Court, as the case may be, thinks sufficient shall be executed by such person, and when he is released on bail by one or more sufficient sureties, conditioned that such person shall attend at the time and place mentioned in the bond, and shall continue so to attend until otherwise directed by the police officer or Court, as the case may be.
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> (2) If the case so requires the bond shall also bind the person released on bail to appear when called upon at the High Court or other Court to answer the charge.

Encik Yaacob submitted that effect has to be given to all of these provisions and a harmonious construction be given to them. When read together, according to him, a magistrate is empowered to release a person on bail for the purpose of compelling the attendance of any person in respect of proceedings under s. 6 of the Act by using the standard form of bail bond prescribed in the Criminal Procedure Code.

A brief mention was made by the Senior Federal Counsel to the Supreme Court decision in *Ang Gin Lee v. Public Prosecutor* [1991] 2 CLJ 857 to support his proposition but he did not however elaborate them. He relied heavily on the decision of Y.A. Haidar bin Mohd. Noor J's in *Public Prosecutor v. Kelvin Soh Ted Poh* [1990] 1 CLJ 54. In that case Haidar J, had, in exercise of his criminal supervisory jurisdiction under s. 323 Criminal Procedure Code in respect of a decision made by a magistrate under s. 6 of the same Act, made the following order:

> In the circumstances I would, in exercise of my revisionary powers, set aside the order of discharge of the Subject by the learned magistrate and would direct the Subject to appear before her on 25 January 1990 to be dealt with in accordance with s. 6 of the Act. In dealing with this matter the learned magistrate will no doubt consider the report of the Rehabilitation Officer (P2) as required under s. 6(3) which appears to recommend for an order under s. 6(1)(b) of the Act. Pending his appearance in the Magistrate Court, the subject is to execute a bond with one surety in the sum of $1000.00.

I called both Counsels to submit further on 10 April 1999 on the issue as to whether proceedings under s. 6 came within the meaning of "Inferior Criminal Court" and whether such proceedings came within the ambit of the power of criminal revision conferred on the High Court by s. 323 Criminal Procedure Code to which both Counsels sought time to conduct further research.

On 15 April 1999, the applicant was represented by a more Senior Counsel, Encik C. V. Prabhakaran. He reiterated the earlier submission made of non-jurisdiction on the part of the magistrate to grant bail, referred to the case of *Hoo Thian Siong v. Public Prosecutor* [1988] 2 MLJ 401, and *Mohd Shahriman Mohd. Khairil v. PP & Anor.* [1998] 2 CLJ 855, which ruled that an applicant had the right to be represented by counsel of his choice and what was meant by "opportunity to make representations" prescribed by s. 6(1). The Court's attention was especially drawn to Mustapha Hussein J's decision in *Hoo Thian Siong* where His Lordship held that the right to make representations means:

> ... the right to protest, which by necessary implication and reading it in the context of Article 5(3) of the Constitution, is the right to challenge whatever is brought against him.

Encik Prabhakaran's submissions on 15 April 1999 did not address the issue of jurisdiction raised by this court as to the ambit of its power of review under s. 323 of the Code and as to whether the proceedings before the magistrate can be regarded as the "record of any proceeding before any inferior Criminal Court". Be that as it may, at the continued hearing date on 19 April 1999 Encik Prabhakaran submitted that after studying the authorities in respect of proceeding before a magistrate under s. 6 of the Act, he conceded that such proceedings are not in relation to proceedings of an "inferior Criminal Court" and therefore does not fall within the ambit of the High Court's criminal supervisory jurisdiction conferred by s. 323 of the Code.

Be that as it may, as the record of those proceedings were now before the court, he invited this court to instead invoke the additional powers conferred by s. 25(2) Courts of Judicature Act, read with para. 1 of the Schedule to the Act, to review the decision made by the magistrate.

The Senior Federal Counsel in his further submission in reply drew the Court's attention to the case of *Lim Hai Sun v. Officer-in-Charge, Drug Rehabilitation Centre and Anor*. [1992] 3 CLJ 1602 to support the proposition that a magistrate had the power to grant bail as in that case the granting of bail by the magistrate concerned was not questioned by Richard Malanjun JC (as His Lordship then was). His response to the case of *Mohd. Shahriman* referred to by the applicant's counsel was that even in that case the inquiry was not held within 14 days of the issuance of an order under s. 4(1) of the Act.

The Senior Federal Counsel informed the court that the need for the magistrate to grant bail arises from very practical reasons. There were cases where a person, having retained counsel to act on their behalf to represent them (as in this case), pursuant to the constitutional right conferred upon them by art. 5(3) of the Federal Constitution, and as recognised from the decision of Mustapha Hussein J in *Hoo Thian Siong*, would then, in exercise of the right to make representations conferred by s. 6(1) of the Act, turn the inquiry before the magistrate into a trial where witnesses would be called, subjected to cross-examination with a duty to observe all the technical rules of evidence followed by submissions. As I understand him it is in the light of the unpredictability of when and what (if any) challenges, are going to be raised in the exercise of this "right to make representation" it was therefore not practicable, nor feasible, for all witnesses to be subpoenaed to be on standby on the return date given by a magistrate when a subject is produced under s. 4(1)(b). That sufficient time was therefore required to issue the necessary subpoena to the witnesses (depending on the challenges made) such that at the inquiry held by the magistrate the subject, through his counsel, is able to exercise to the fullest extent of what they perceive to be their right "to make representation", is.

The Senior Federal Counsel in his further submission did not specifically address the court on the issue of jurisdiction raised by this court as to whether it has power to review the decision of the magistrate under s. 323 of the Code. The Senior Federal Counsel gives me the impression that this court can still do so under s. 323 of the Code and for this court to subsequently hold that the granting of bail was in order leaving quantum to be determined by this court. Alternatively, if s. 323 of the Code is considered inapplicable, that this court can exercise its power of review under s. 35 of the Courts of Judicature Act 1964.

From the authorities cited before me the determination of the issue of whether a magistrate has jurisdiction or not to grant bail in the circumstances before me, and whether this court has the power to exercise its power of criminal revision, is not a simple matter of construction as it initially appears.

The starting point of the legal position is to examine the High Court's power of criminal revision under s. 323 Criminal Procedure Code as well as under the general supervisory and revisionary jurisdiction of the High Court under ss. 25 and 35 Courts of Judicature Act 1964, and thereafter to examine the power conferred upon a magistrate as well as the legislative scheme of the Act.

Firstly, an examination of the legal provisions in question. Section 323 Criminal Procedure Code, s. 25 read with para. 1 of the Schedule and s. 35 Courts of Judicature Act reads as follows:

(a) **Section 323(i) Criminal Procedure Code**

> 323. (i) A Judge may call for an examination the record of any proceeding before any inferior Criminal Court for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court.

(b) **Courts of Judicature Act 1964**

(i) Section 25

(1) ...

(2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule:

> Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same.

(ii) Paragraph 1 Schedule

> 1. Power to issue to any person or authority directions, orders or writs, including writs of the nature of *habeas corpus*, *mandamus*, prohibition quo warrants and *certiorari*, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose.

(c) **Section 35 Courts of Judicature Act 1964**

> 35.(1) In addition to the powers conferred on the High Court by this or any other written law, the High Court shall have general supervisory and revisionary jurisdiction over all subordinate courts, and may in particular, but without prejudice to the generality of the foregoing provision, if it considers desirable in the interest of justice, either of its own motion or at the instance of any party or person interested, at any stage in any matter or proceeding, whether civil or criminal, in any subordinate court, call for the record thereto, and may remove the same into the High Court or may give to the subordinate court such directions as to the future conduct of the same as justice may require.

With regard to the issue whether proceedings before a magistrate in exercise of the powers conferred by the Act is within the category of proceeding of an "inferior Criminal Court" or in exercise of their jurisdiction as a 'subordinate court' it would appear that the correctness of Y.A. Mohd. Haidar J's decision in *Soh Ted Foh's* case referred to by the Senior Federal Counsel where His Lordship exercised his criminal supervisory power under s. 323 of the Code to review the decision of a magistrate under s. 6 of the Act, must now necessarily be reviewed in the light of the subsequent pronouncement of the Supreme Court in the case of *Ang Gin Lee.*

In *Ang Gin Lee* the Supreme Court, on a reference under s. 66 of the Courts of Judicature Act 1964 by the Miri High Court, to determine questions of law arising from rulings made by Dennis Ong J whether:

> (1) an order made under s. 6(1)(a) Drug Dependants (Treatment Rehabilitation) Act is not an order pronounced by a magistrate court in a criminal case or matter to which is a party under s. 307(i) of the Criminal Procedure Code (FMS Cap. 6) and therefore the applicant has no right of appeal; and
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> (2) it is not possible for the Court to exercise its revisionary and supervisory powers under ss. 323 and 325 of the Criminal Procedure Code (FMS Cap. 6) and s. 35 of Courts of Judicature Act (91).

answered both questions in the negative. In that case the Supreme Court clearly drew a distinction between powers expressly conferred on a 'Magistrate' as distinct from a 'Magistrate's Court'.

In his judgment Y.A.A. Hashim Yeop Sani CJ (Malaya) had ruled that an order under s. 6(1)(a) of the Act is not appealable to the High Court nor is the order subject to revision by the High Court. The judgment of the Supreme Court reads:

> The criminal jurisdiction of a First Class Magistrate is provided in s. 85 of the Subordinate Courts Act 1948. Section 26 of the Courts of Judicature Act 1964 (Act 91) provides that the appellate criminal jurisdiction of the High Court shall consist of 'the hearing of appeals from subordinate courts according to the law for the time being in force within the territorial jurisdiction of the High Court. The term 'subordinate court' is defined in s. 3 of Act 91 to mean any inferior court from the decisions of which by reason of any written law there is a right of appeal to the High Court.
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> It would seem to us that the legislative scheme of s. 6 of the Drug Dependants (Treatment and Rehabilitation) Act viewed with the provisions of criminal jurisdiction and appeal in the two legislation referred to show quite clearly that the order of the magistrate under s. 6 of the act is not an order appealable to the High Court. This ground alone should dispose of the appeal before the learned judge.
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> The second ground set out in the judgment of the learned judge is the construction of the words 'criminal case or matter' under s. 307(i) of the Criminal Procedure Code. Section 307(i) of the CPC provides that any person who is dissatisfied with any judgment, sentence or order pronounced by a magistrate's court in a criminal case or matter to which he is a party may prefer an appeal to the High Court against such judgement, sentence or order.
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> ...
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> ...
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> There is no doubt in the present that the order has a final effect and disposes of the right of the applicant. But that is not the end of the matter. To satisfy s. 307(i) of the Criminal Procedure Code it is also necessary to ask the equally crucial question – was the order made in a criminal case or matter?
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> ...
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> ...
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> Looking at the provision relating to jurisdiction of the magistrate and the appeal provisions provided by our law we agree with the learned judge that the order made by a magistrate in this case is not an order pronounced by a magistrate's court in a criminal case or matter for the purpose of s. 307(i) of the Criminal Procedure Code.

Question 2 is concerned with the powers of the learned judge under s. 323 and 325 of the Criminal Procedure Code. Section 31 of the Courts of Judicature Act 1964 confers on the High Court powers of revision in respect of criminal proceedings and matters in the subordinate courts in accordance with any law for the time being relating to criminal procedure.

It is obvious from the language of these provisions that our answer to question 2 must also be in the negative.

We appreciate that the provisions of s. 6 of the Act, is penal in character in the sense that a person can be ordered to reside in a rehabilitation centre for two years to undergo treatment probably against his will. At the same time we also appreciate that it is a provision designed for the rehabilitation of drug dependants. It is a social legislation of sort. But we must not forget however that the same legislation confers summary powers on the magistrate and can seriously affect the freedom of an individual. It was perhaps realizing this aspect of the legislation that the learned judge in this case suggested that if the applicant was dissatisfied with the order of the magistrate he should look elsewhere for reliefs. In other words if any person is dissatisfied with the order of the magistrate under that provision of the law because of some irregularity he should have access to the High Court but not through the appeal process. This judgment merely lays down the law that according to existing provisions of the law there is no appeal to or revision by the High Court from the order of the magistrate under s. 6 of the Act.

Section 35 of the Courts of Judicature Act 1964 confers general supervisory powers on the High Court over the subordinate courts. This provision is to be construed as no more than providing for jurisdictional basis. Read in the context of ss. 31, 32 and 33 of that Act, it would seem to us that s. 35 is particularly aimed at providing supervision in criminal or civil proceeding at any stage of the trial in a subordinate court.

A brief mention was in fact made in *Ang Gin Lee* by the Honorable Chief Justice to reported cases on s. 6 then, including that of Haidar J's judgment in *Soh Ted Foh*, where the Chief Justice commented that Haidar J had dealt with the interpretation of s. 6 of the Act without first determining his jurisdiction to do so.

That there is a clear distinction in the exercise of a power by a 'Magistrate Court' in the exercise of its civil and criminal jurisdiction conferred by the Subordinate Court Act as contrasted with that conferred upon a 'magistrate' by other written laws (as in this Act) is therefore now settled law.

We are here concerned with the purported exercise of a power by a magistrate to compel attendance at an inquiry to be held as to whether an order under s. 6 should be made against the applicant. I am of the view, applying *Ang Gin Lee*, if a magistrate's decision under s. 6 is "not an order pronounced by a Magistrate's Court in a criminal case or matter", then a decision granting

bail to secure attendance at such a hearing under s. 6 equally cannot also be considered to be an order pronounced by a "Magistrate's Court in a criminal case or matter," nor does it fall in the category of proceedings before "an inferior criminal court" as prescribed under s. 323 of the Code. In these circumstances this court is therefore not empowered to exercise its powers of criminal revision conferred upon it by s. 323 of the Code, nor under its general supervisory and revisionary jurisdiction conferred by s. 35 of the Courts of Judicature Act 1964 as contended by the Senior Federal Counsel.

As for the decision of Y.A. Dato' Suriyadi Halim Omar J's judgment in *Mohd. Khairil Mohd. Shahriman* referred to me by counsel for the applicant, on the issue of what is meant by the "right to make representation". I observe that His Lordship in that case did not make this distinction in jurisdiction of a 'Magistrate' and a 'Magistrate Court' when he dealt with an application of a writ of *habeas corpus* arising from an order made by a magistrate under s. 6 of the same Act. I observe that Suriyadi J in his judgment had described the inquiry held by the magistrate as a 'judicial inquiry' (See p. 859 para. e), an order under s. 6 as being under 'detention'. In laying out the facts of that case in his judgment, the order obtained under s. 4(1)(b) of the Act was referred to as an order obtained from the 'Magistrate's Court' (see p. 867 para. a). Suriyadi J also ruled that there was a need on the part of magistrates to record fully what transpired at the inquiry, to ensure that they do give the subject a right to make representation so that "he may thenceforth challenge anything thrown at him and perhaps escape the more severe sentence or even escape completely all the charges". (See p. 869 para. f). With respect, these pronouncements and rulings appear to be inconsistent with the decision of the Supreme Court in *Ang Gin Lee*, which decision is binding on the High Court.

I do however share Suriyadi J's concern that the Courts should always be anxious to protect the liberty of the subject. They do so both in the interest of the subject himself as well as in the public interest. Be that as it may, there are times however where the statute have deemed it necessary to sacrifice personal interests in favour of public interest.

The cardinal rule of construction of statutes is to read the statute literally, that is, by giving the words used by the Legislature their ordinary, natural and grammatical meaning. And where the language of the law is clear, effect must be given to it and it is not necessary to see whether the interpretation put on the law is likely to lead or not to hardship. In construing statute resort may also be had to the well recognised rule of construction, *"expressio unius est exclusio alterius"*, the expression of one thing necessarily involve the exclusion of other things not expressed. Omission in one section cannot be regarded as accidental. If the meaning of the language is plain and clear, then the court has nothing to do but obey it to administer as we find it. To take a different course is to abandon the office of judge and to assume the province of legislation.

The Act in this case incorporates into it the rule of natural justice. It expressly imposes upon the magistrate, before making an order under s. 6 a duty to give the subject "an opportunity to make representations". It does not however set any guidelines on the procedural aspect. In the absence of any special procedure it must necessarily left to the discretion of the magistrate to regulate its own method of proceedings.

Raja Azlan Shah FJ (as His Majesty then was) in *Ketua Pengarah Kastam v. Ho Kwan Seng* [1977] 2 MLJ 154, in relation to a decision by a custom officer to a cancellation of registration as a forwarding agent relating to the import and export of goods upon conviction of two offences under the Customs Act held on the issue of natural justice as follows:

> In my opinion, the rule of natural justice that no man may be condemned unheard should apply to every case where an individual is adversely affected by an administrative action, no matter it is labeled "judicial", "quasi-judicial", or administrative or whether or not the enabling statute provides for a hearing. But the hearing may take many forms and strict insistence upon an inexorable right to the traditional courtroom procedure may lead to a virtual administrative breakdown. That is because a formal hearing is too slow, too technical and too costly ... . In the final analysis, it depends on the subject matter. The great need is to deal effectively and fairly.

It is pertinent to observe that in *Ang Gin Lee* the Supreme Court had described this Act as a "social legislation" although it is "penal" in effect. The Supreme Court did not however refer to an order under s. 6 as an order of "preventive detention". On my part I am of the view that this Act is clearly not in the same category of preventive detention laws passed pursuant to the powers conferred by art. 149 Federal Constitution of which there are at present only three ie, the Internal Security Act 1960, the Emergency (Public Order and Prevention of Crime) Ordinance 1969 and the Dangerous Drugs (Special Preventive Measures Act) 1985.

The mischief which the legislature appears to want to remedy by this Act appears to be twofold. Firstly that it is deemed necessary in the public interest to make provision for drug dependants not to be charged under the criminal law in respect of their drug addiction. Secondly, that it is deemed necessary not only in the public interest, but also in the drug dependants' personal interest that, should the drug dependants not voluntarily surrender themselves for treatment, they be compulsorily subjected to treatment and rehabilitation; that such persons would be placed under the custody of a Rehabilitation Officer through an order issued by a magistrate. As enumerated in *Ang Gin Lee* above, in exercising their statutory duty under the Act, it was authoritatively held that the magistrate is not exercising jurisdiction in a criminal case or matter.

The conferment of the "right to make representations" in my opinion carries with it the obligation on the part of the magistrate to furnish the grounds upon which an order compelling a person to be admitted to a Rehabilitation Center for treatment would be made. In this context the magistrate should inform the person of the result of the tests that that person had undergone under s. 4(1)(b), the recommendation of the Rehabilitation Officer, and giving the person concerned an opportunity of proffering any explanation or excuse he wished to put forward.

In relation to the scheme under the Act, I hold, the duty to act fairly does not mean that the magistrate should be compelled to conduct an inquiry as if it is a judicial court by calling witnesses (ie, the officer who took custody of him under s. 3, the Medical Officer, and other witnesses) affording the subject an opportunity to cross-examine (eg, to establish a break in the chain in the evidence) as if it is a trial. I am of the view if indeed the Legislature required Government Medical Officers or medical practitioners to furnish a magistrate with detailed facts and analysis of his examination, observations and tests, it would not have used the clear and precise word "result" in s. 4(1)(b) of the Act. The law prescribes that a magistrate is entitled to accept the result of the examination conducted and is entitled to be guided by the findings of medical facts by the issuance of a certificate in the prescribed form, and thereafter, to act on the recommendation of the Rehabilitation Officer.

Coming to the issue of whether a magistrate has jurisdiction to grant bail. The need to exercise such a power is clearly tied up with the procedure to be followed by the magistrate in according a person a right to make representations. I am of the view, taking into consideration the express inclusion of a provision as to bail in s. 4, and the absence of such an enabling provision in s. 6, fortifies my earlier opinion that no "trial" is necessary. Giving the words in ss. 4 and 6 of the Act their ordinary and literal meaning a magistrate only has power to grant bail in the circumstances prescribed in s. 4(1)(b) and not at the stage of proceedings in s. 6. The omission to make provision as to bail in s. 6 cannot and should not be regarded as accidental. That upon the results being known, and a person has been confirmed to be a drug dependant, the magistrate must, upon receipt of such certification, and taking into consideration a Rehabilitation Officer's report and after giving the person an opportunity of giving an explanation make any order that he deems fit. In the light of the stand that I have taken, that the magistrate is not obliged to conduct a "trial", the administrative problems raised by the Senior Federal Counsel in his submission would therefore no longer arise.

Case law on this Act has shown that a magistrate's decision under the Act for the purpose of a rehabilitation decision is liable to be reviewed by way of judicial review. (See the decision of Y.A. Chong Siew Fai J (as His Lordship then was) in *Re Haji Sazali bin Datuk Haji Noor Tahir* [1992] 3 CLJ 1753). I agree. The Superior Courts have an inherent jurisdiction to review the exercise by public bodies or officers of statutory powers impinging on legally recognised interests as well as the additional powers conferred by s. 25(2) read with the Schedule to the Court of Judicature Act 1964. The repository of such a statutory power or duty must exercise such power fairly and will be required genuinely to discharge its functions when the occasion arises. It is also settled law that where such a body has exceeded or acted outside without jurisdiction, or has failed to act fairly or acted not in accordance with the rules of natural justice its decision may be set aside.

Counsel for the applicant has now conceded that the decision of the magistrate in question is not reviewable under s. 323 of the Code. He instead now invites this court to exercise its power of supervisory jurisdiction pursuant to the powers conferred by s. 25(2) Courts of Judicature Act 1964. In the light of my ruling, that a magistrate has no power or jurisdiction to grant bail, the decision dated 18 March 1999 of the magistrate is liable to be set aside by an order of *certiorari* to quash, or by way of a declaratory order. Be that as it may the exercise of the power under s. 25(2) however "shall be exercised in accordance with any written law or rules of court relating to the same" of which r. 53 Rules of the High Court 1980 applies. I am of the view that it is not appropriate for this court to hop from its criminal jurisdiction over to its civil jurisdiction by converting this criminal application for revision into an application for judicial review without the need on the part of the applicant to comply with O. 53 Rules of the High Court 1980. Taking into consideration the fact that the magistrate has already dealt with the applicant and released him, and the issue of the bail is now rendered academic, I decline to exercise my discretionary power, and this application for criminal revision is accordingly dismissed.